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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 599

UNITED STATES OF AMERICA,
Respondent-Appellee,
v.
COUNTY OF WAYNE,
Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND APPENDIX

WILLIAM L. CAHALAN,
Prosecuting Attorney,

ALOYSIUS J. SUCHY and
WILLIAM F. KONEY,
Assistant Prosecuting Attorneys,
Attorneys for County of Wayne, a
Michigan Constitutional Body
Corporate, Petitioner-Appellant,
601 City-County Building,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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IN THE

Supreme Court of the United States

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No. .....

UNITED STATES OF AMERICA,
Respondent-Appellee,
v.
COUNTY OF WAYNE,
Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI

TO: The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on June 14, 1967.

A. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported as of this date; a copy of the judgment and opinion of said Court is attached hereto as Appendix B. The opinion of Honorable Fred W. Kaess, District Judge for the Eastern District of Michigan, is reported in 247 F. Supp. 84; same is attached hereto as Appendix C.

B. JURISDICTION

(i) This suit was brought and original jurisdiction invoked by respondent-appellee, United States of America, Under Title 28, United States Code, Sections 1340 and 1345, and Title 26, United States Code Annotated, Section 7402(a).

(ii) Respondent-appellee, United States of America, asserting absolute priority under Section 3466 R.S., 31 USCA 191, filed an action in the United States District Court for the Eastern District of Michigan, Southern Division, on May 7, 1963, seeking to enforce its federal tax liens against a sum of money remaining in the approximate amount of $4,000.00 held by a Trustee under a trust mortgage dated April 29, 1961. The amount held by the Trustee was the balance remaining after payment of certain tax liens of the City of Detroit and the United States under the principle of "first in time; first in right", which payments were made prior to institution of this cause. The amount held by such Trustee is not sufficient to pay the various remaining tax lien liabilities of the insolvent tax debtor. Petitioner-appellant, County of Wayne, asserted

a tax lien claim against said fund for unpaid *ad valorem* personal property taxes which were prior in time to United States tax liens based on the principle of "first in time; first in right." The suit was disposed of by opinion and judgment of the United States Court of Appeals for the Sixth Circuit, Appeal No. 17,146, affirming summary judgment ordered by the Trial Judge in favor of respondent-appellee, United States of America. The United States Court of Appeals without specifically determining whether or not Michigan *ad valorem* tax liens were specific and choate so as to come within the implied judicial exception to Section 3466 R.S., 31 USCA 191, affirmed the judgment of the lower Court, citing amongst other cases, *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953), 97 L. Ed. 1071, 73 S. Ct. 701, as authority for its affirmation.

(iii) Jurisdiction of this Court to issue a writ of certiorari is conferred by C. 646, 62 Stat. 928, (28 USCA 1254(1)); C. 646, 62 Stat. 961, as amended by C. 139, Section 106, 63 Stat. 104 (28 USCA 2101(c)).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where tax debtor is insolvent, should an *ad valorem* personal property tax lien under Michigan law, which lien meets the test of choateness set forth in *U. S. v. New Britain,* 347 U.S. 81 (1954), 98 L. Ed. 520, 74 S. Ct. 367; and *U. S. v. Vermont,* 377 U.S. 351 (1964), 12 L. Ed. 2(d) 370, 84 S. Ct. 1267, and which lien is capable of being summarily enforced administratively without any assistance of the courts, considered specific, perfected and choate so as to be excepted from the application of Section 3466 R.S., notwithstanding the specificity rule set forth in *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953), 97 L. Ed. 1071, 73 S. Ct. 701?

2. Is the principle of specificity enunciated in *U. S. v. Gilbert Associates (supra)*, construing a New Hampshire tax law, applicable without exception to all the sovereign states, including Michigan, without requiring any review of the tax structure of each state to determine whether under its tax laws possession is necessary in order to perfect an *ad valorem* personal property tax lien?

D. QUESTION NOT PRESENTED FOR REVIEW

The existence of a judicial exception to the absolute priority rule in Section 3466 Revised Statutes, excluding from its purview, specific, perfected and choate liens, has not been contested by the Federal government, and is not presented herein for review.

E. STATUTES INVOLVED

Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix A attached hereto.

Michigan Statutes Annotated:

Sec. 7.1 (C.L. 1948, Sec. 211.1)
Sec. 7.81 (C.L. 1948, Sec. 211.40)
Sec. 7.83 (C.L. 1948, Sec. 211.42)
Sec. 7.87 (C.L. 1948, Sec. 211.44)
Sec. 7.91 (C.L. 1948, Sec. 211.47)

Section 3466 Revised Statutes (31 USCA 191)

F. STATEMENT OF THE CASE

This case involves interpretation of Section 3466 R.S., 31 USCA 191, under which United States is claiming priority of its tax liens which were later in date to the *ad valorem* personal property tax liens of the County of Wayne. The tax debtor was insolvent at the time the United States asserted its claim of priority. Petitioner-appellant, County of Wayne, asserts that the priority arising under Section 3466 does not override the County's specific and perfected liens for *ad valorem* personal property taxes.

The County of Wayne claimed its liens arose prior to assertion of liens by the United States. The County particularly relied on a decision of the Michigan Supreme court, specifically *In Re Ever Krisp Food Products Co.*, 307 Mich. 182, 11 N.W. 2d, 852 (1943), which in effect held that such Michigan lien is specific and perfected when nothing further need be done to perfect it. The *Ever Krisp* decision was acquiesced to in *U. S. v. O'Dell,* 61 F. Supp. 966, affirmed 160 F. 2d 304, Sixth Circuit (1945). Therefore, distribution of the funds held by Trustee should have been made on the principle of "first in time; first in right".

In this cause, the Trial Judge and the United States Court of Appeals applied the rule contained in the *Gilbert Associates* case, where it was held that the New Hampshire township was required under its tax laws to reduce to possession the property of an insolvent tax debtor in order to establish a claim of specificity. Without reviewing the statutory provisions establishing the *ad valorem* personal property tax liens under Michigan law and comparing same with the New Hampshire tax laws for similarity, the Trial Judge issued his opinion in favor of respondent-appellee, United States of America, granting summary judgment, and an order thereon was entered on November 2, 1965 (App. 48a).

Following appeal and oral argument, the Court of Appeals affirmed the order for summary judgment for the reason set forth in the opinion of Honorable Fred W. Kaess, District Judge, reported in 247 F. Supp. 84. A copy of the opinion of the United States Court of Appeals being unreported as of this date, is appended hereto as Appendix B (Rule 23 (iii)(i)).

It is the position of petitioner-appellant, County of Wayne, that under Michigan law a lien for *ad valorem* personal property taxes is specific, perfected and choate without possession since nothing further is required to be done under its tax laws to perfect the lien and such lien is therefore impliedly excepted from application of Section 3466 R.S. This being so, competing liens of the Federal government and the County of Wayne should be determined on the basis of the principle of "first in time; first in right" as propounded by Chief Justice Marshall in *Scott v. Rankin,* 12 Wheat. 177, 179.

G. REASONS FOR GRANTING WRIT

1. Both the Trial Judge and the United States Court of Appeals without reviewing the statutory provisions establishing the *ad valorem* property tax liens under Michigan law and without comparing same with the New Hampshire tax laws for similarity, applied the standard of specificity contained in the *Gilbert Associates* case.

The Trial Judge and the Court of Appeals should have reviewed the respective tax structures of both New Hampshire and Michigan in order to determine whether any similarity exists. If a comparison were made, the question of whether the standard of specificity as appears in the *Gilbert Associates* case applies to Michigan would have been resolved in the negative.

Briefly, under New Hampshire law, (at the time of the *Gilbert Associates* case) the township assessed certain machinery to taxpayer as realty and maintained that such assessment had the force of a judgment entitled to recognition and protection under Section 3672 I.R.C. of 1939. It is clear that the taxing units in New Hampshire under its tax laws did not have any lien for taxes assessed on personal property; that only the person in possession of the personalty and liable for taxes assessed thereon, could acquire a lien for the taxes paid by him, Sections 72:17, 72:34, 73:12, 73:25, 1955 N.H. Rev. S.A., formerly Sections 73:18, 74:12, 74:25 and 74:4, respectively.

Since under New Hampshire law, taxing authorities did not have any lien against the personal property assessed, the significance of the specificity standard under the *Gilbert Associates* case becomes clear, namely, that where no lien exists by statute, a lien may nevertheless be acquired through possession of the debtor's property. This the New Hampshire township had not done.

However, in Michigan, under its tax laws, a tax assessed against personal property becomes a *lien* on a specific day (December 1 for county taxes) and *remains so* until paid, Section 7.81 MSA. Not only does the lien remain until fully paid, but Michigan law authorizes seizure and sale of tax debtor's property administratively without judicial proceedings or assistance, Section 7.91 MSA.

It is respectfully submitted that since Michigan tax laws differ substantially with New Hampshire laws, the *Gilbert Associates* case should not be accepted as authority for striking down the County's *ad valorem* personal property tax lien as being inchoate without seizure. It is further submitted that in order to use a standard of specificity it would be necessary that all taxing authorities throughout the United States have a standard uniform tax structure.

2. Due to the independent sovereignty of the various states and their individual tax structures, the question of whether the *Gilbert Associates* case applies to all local taxing units without regard to their tax structure and without regard to the fact that local legislative enactments may not require possession for the perfection of *ad valorem* tax liens, is a matter requiring clarification by this Court.

3. The basic rule of fair play requires the use of the principle of "first in time; first in right" with respect to competing Federal and local tax lien claims. Any rule to the contrary would create situations inequitable to and infringing upon the rights of the local units of government to levy and collect its taxes. Harmony in the co-existence of local and Federal governments is beneficial to each and should always be encouraged whenever possible, thereby giving continued, meaningful significance to "States" in the United States.

The Trial Judge, even though believing that the principle of "first in time; first in right" would be more equitable (47a), nevertheless held that the *Gilbert Associates* case controlled in determining the choateness of Wayne County's personal property *ad valorem* tax lien. If it were not for the *Gilbert Associates* case, it appears that the Trial Judge would have agreed with the language of Mr. Justice Yeates in *State v. Nicholls,* 4 Yeates 251 (1805), writ of error dismissed, 4 Wheat. 311, where Justice Yeates of the Pennsylvania Supreme Court, in speaking for the Court, stated at page 259:

> "* * * that congress have the *concurrent* right of passing laws to protect the interest of the union, as to debts due to the government of the *United States* arising from the public revenue; but in so

doing, they cannot detract from the uncontrollable power of individual states to raise their own revenue, nor infringe on, or derogate from the sovereignty of any independent state * * *.

"* * * The rights of the general government to priority of payment, and the rights of individual states, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This only can be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured."

and would have applied the principle of "first in time; first in right" which has been the rule of law long established in Michigan by the *In Re Ever Krisp Food Products Co.* case, 307 Mich. 182, (1943).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. CAHALAN,
Prosecuting Attorney,
ALOYSIUS J. SUCHY and
WILLIAM F. KONEY,
Assistant Prosecuting Attorneys,
Attorneys for County of Wayne, a Michigan Constitutional Body Corporate, Petitioner Appellant,

By: WILLIAM F. KONEY,
Assistant Prosecuting Attorney,
601 City-County Building,
Detroit, Michigan 48226.

Dated: August 31, 1967.

APPENDIX A

MICHIGAN STATUTES ANNOTATED

7.1 MSA (Compiled Laws of Michigan 1948, 211.1)

"PROPERTY SUBJECT TO TAXATION. Section 1.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT, That all property, real and personal within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.

7.81 MSA (Compiled Laws of Michigan 1948, 211.40)

"Notwithstanding any provisions in the charter of any city or village to the contrary, all taxes shall become a debt due to the township, city, village and county from the owner or person otherwise to be assessed on the tax day provided for in sections 2 and 13 of this act, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. Each statement and receipt for taxes on real estate sent or given by any county, township, city or village treasurer shall contain a statement, which shall be printed, stamped or written thereon, setting forth the date of the commencement and ending of the

fiscal year of each taxing unit of government during which general taxes stated thereon will defray the costs of governmental services rendered thereby. And all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, and whether such liens, claims and encumbrances created by chattel mortgage, title retaining contract, execution or upon any other final process of a court, attachment, replevin, judgment or otherwise, become effective prior to the effective date of this act or subsequent thereto, and no transfer of personal property assessed for taxes thereon shall operate to divest or destroy such lien, except where such personal property is actually sold in the regular course of retail trade. The personal property taxes hereafter levied or assessed by any city or village shall be a first lien, prior, superior and paramount to any other claims, liens and encumbrances whatsoever upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

7.83 MSA (Compiled Laws of Michigan 1948, 211.42)

"The supervisor shall thereupon prepare a copy of the said assessment roll, with the taxes assessed as hereinbefore provided, and annex thereto a warrant signed by him, commanding the township or city treasurer to collect the several sums mentioned in the last column of such roll and to retain in his hand the amount receivable by law into the township treasury for the purpose therein specified, and to pay over to the county treasurer the amounts which shall have been collected for state and county purposes up to and including the tenth day of January next following, and to the treasurer of each school district the amounts which shall have been collected for such school district up to and including the tenth day of January next following, within 10 days thereafter, and notify the secretary or director of each school district the amount paid to the school district treasurer and the remainder of the amounts therein specified for said purposes, and account in full for all moneys received on or before the first day of March next following; and the said warrant shall authorize and command the treasurer, in case any person named in the assessment roll shall neglect or refuse to pay his tax, to levy the same by distress and sale of the goods and chattels of such person. The supervisor may make a new roll and warrant in case of the loss of the one originally given to the township treasurer; the copy of the roll with the warrant annexed, shall be known as 'the tax roll.'"

7.87 MSA (Compiled Laws of Michigan 1948, 211.44)

"On receiving such tax roll the township treasurer or other collector shall proceed to collect such taxes. The twonship treasurer or other collector shall mail to each taxpayer at his last known address on his tax

roll, on the receipt of such tax roll, a statement showing the description of the property against which the tax is levied, the assessed valuation of such property and the amount of the tax thereon. The expense of preparing and mailing such statement shall be paid from county, township, city or village funds, as the case may be. Failure to send or receive such notice shall not in any way prejudice the right to collect or enforce the payment of any tax. The township treasurer shall remain in his office at some convenient place in his township, village or city on every Friday in the month of December, thereafter, from 9:00 a.m. to 5:00 p.m. to receive taxes, but he shall receive taxes upon any week day when they may be offered. On all sums voluntarity paid before January 20 of the succeeding year, he shall add 1% for collection fees, and upon all taxes paid on or after January 20 he shall add 4%. If the treasurer shall not mail the statements hereinabove required to be mailed on or before December 30, he shall be limited to 1% for collection fees with respect to taxes collected by him on and after January 20. In townships in which the treasurer receives a salary, the township board may waive all or part of the 4% collection fee on taxes paid on or before February 15. All fees collected by the township treasurer in townships where the treasurer receives a salary shall be credited to the contingent fund of the township. When the bond of the treasurer, as provided in section 43, is furnished by a surety company, the cost of the bond shall be paid by the township from the contingent fund of the township. If the township treasurer is apprehensive of the loss of any personal tax assessed upon his roll, he may enforce its collection at any time, and if compelled to seize property or bring suit in December may add 4% for collection fees."

7.91 MSA (Compiled Laws of Michigan 1948, 211.47)

"If any person, firm or corporation shall neglect or refuse to pay any tax assessed to him or them, the township or city treasurer, as the case may be, shall collect the same by seizing the personal property of such person, firm or corporation, to an amount sufficient to pay such tax, fees and charges for subsequent sale, wherever the same may be found in the state, and from which seizure no property shall be exempt. He may sell the property seized to an amount sufficient to pay the taxes and all charges, in the place where seized, or in the township or city of which he is treasurer, at public auction, on giving public notice of the same at least five (5) days previous to the sale, by posting written or printed notices in three (3) public places in the township, village or city where the sale is to be made, which sale may be adjourned from time to time if he shall deem the same necessary; and in case property shall be seized and advertized as herein directed, during the life of the warrant, the sale may take place at any time within six (6) days after the expiration thereof. If it becomes necessary to sell personal property which brings more than the amount of taxes and charges, the balance shall be returned to the person, firm or corporation from whose possession the property was taken, except as hereinafter provided. If the property so distrained cannot be sold for want of bidders, and in such case only, the treasurer shall return a statement of the fact, and such tax shall be returned as unpaid. The township treasurer, if otherwise unable to collect a tax on personal property, may sue the person, firm or corporation to whom it is assessed, in the name of the township, village or city, and garnishee any debtor or debtors of such person, firm

or corporation. The tax roll shall be *prima facie* evidence of the debt sought to be recovered: Provided, That when any person having possession of the personal property of any other person, firm or corporation shall be assessed for such property and shall be obliged to pay the taxes thereon, such person, firm or corporation so paying the taxes, may recover of the person, firm or corporation for whose benefit the taxes were paid, the money so paid, with the interest thereon in an action of assumpsit: * * * "

Section 3466 Revised Statutes (31 USCA 191).

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

APPENDIX B

No. 17146

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America, *Plaintiff-Appellee,* v. County of Wayne, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Michigan.

Decided June 14, 1967.

Before: Weick, Chief Judge, O'Sullivan and Celebrezze, Circuit Judges.

Per Curiam. The question on appeal is whether a local tax lien, which is a general lien upon the taxpayer's personal property, is superior to the priority of the United States Government under Section 3466 of the Revised Statutes, where the local taxing authority has taken no action to attach its general lien to specific property of the taxpayer before the taxpayer becomes insolvent and his assets subject to a distribution for the benefit of his creditors.

The District Court granted the motion of the United States for summary judgment. We affirm for the reasons set forth in the District Court's opinion of October 7, 1965, and also the opinions of the Supreme Court of the United States in *Spokane County v. United States*, 279 U.S. 80; *New York v. Maclay*, 288 U.S. 290; *United States v. Texas*,

314 U.S. 480; *United States v. Waddill Co.*, 323 U.S. 353; *Illinois v. Campbell*, 329 U.S. 362; *United States v. Gilbert Associates*, 345 U.S. 361; *United States v. New Britain*, 347 U.S. 81; *United States v. Vermont*, 377 U.S. 351; *United States v. Equitable Life*, 384 U.S. 323.

Affirmed.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 17,146

United States of America,
Plaintiff-Appellee,
v.
County of Wayne,
Defendant-Appellant.

Before: Weick, Chief Judge, O'Sullivan and Celebrezze, Circuit Judges.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America, *Plaintiff,* v. Louis F. Davis, Trustee, Midwest Steel Fabricators, Inc., County of Wayne, Michigan Corporation and Securities Commission, Michigan Department of Revenue, Michigan Employment Security Commission, *Defendants.*	Civil No. 23847

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

At a session of said court held in the Federal Building in the City of Detroit, Michigan, on October 7, 1965.

Present: The Honorable FRED W. KAESS, United States District Judge.

This is an action instituted by the United States of America to foreclose certain tax liens against a fund held by defendant Louis F. Davis, as Trustee, of assets of the defendant-taxpayer, Midwest Steel Fabricators, Inc., under a trust mortgage for the benefit of creditors of assets.

The trust mortgage was executed on April 29, 1961, for the purpose of completing existing contracts and liquidating the company. The Trustee carried out the contracts, realized profits, collected the accounts receivable and liquidated the assets by public auction. The total fund remaining after the payment of certain expenses was $13,034.97.[1] Tax claims in the amount of $24,066.10 were filed by various taxing authorities. By agreement, the Internal Revenue Service was paid $8,210.08 on a lien which all agreed was prior. In this action, the United States seeks to foreclose other tax liens against the remaining $4,824.89, by virtue of four tax assessments made against the Midwest Steel Fabricators, Inc., the pertinent facts of which are summarized as follows:

Period of tax	Date of Assessment	Amt. Outstanding on Original Assessment	Amt. Interest Accrued to 4–29–61
4Q 1959	2/26/60	$1,230.68	$90.86
4Q 1960	2/24/61	2,252.32	33.45
1Q 1961	6/ 2/61	3,660.42	0
2Q 1961	6/ 2/61	381.56	0

[1] At this time the Trustee paid $2,064.00 to the City of Detroit in full payment of 1960 and 1961 personal property taxes. The City had levied upon and seized the personal property of Midwest Steel Fabricators, Inc. on April 27, 1961 for failure to pay the 1960 personal property tax of $724.05, and on May 2, 1961 had recorded a jeopardy tax assessment affidavit, pursuant to Michigan Statutes Annotated Section 7.51(1)-7.51(7), which stated that a 1961 personal property tax in the amount of $1,509.92 had been levied and assessed upon the personal property of Midwest Steel Fabricators, Inc. On May 2, 1961, subsequent to the filing of this jeopardy affidavit, the City of Detroit released the property to the Trustee, on condition that he would sell it and pay the City in full. The City of Detroit moved to intervene in the instant case. The motion was denied, but the City was allowed to file a brief Amicus Curiae.

Other tax liens against this fund are:

Date of Lien	Taxing Authority	Amount of Lien
12/ 1/60	Wayne County .	$197.08
4/25/61	Michigan Employment Securities Comm.	914.23
5/ 3/61	Wayne County	247.88
5/15/61	Michigan Corporation & Securities Comm.	39.50
7/ 7/61	Michigan Dept of Revenue (2)	4195.34
7/25/61	Michigan Employment Security Comm.	235.27

The Trustee makes no claim on the fund and asks only that the Court determine the ownership thereof.

The United States filed a motion for a summary judgment on the ground that, as a matter of law, it is entitled to an award of the entire fund now before the Court, in partial satisfaction of its tax liens. In support of the motion it relies upon the statement of facts filed with the Court by defendant Trustee Davis and affidavits of the District Director of Internal Revenue.

Section 6321 of the Internal Revenue Code of 1954 creates a lien against all property or rights to property belonging to the taxpayer.[2] This lien attaches to the property on the date of assessment pursuant to Section 6322 of the Internal Revenue Code of 1954.[3]

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[2] Sec. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U.S.C. §6321)

[3] Sec. 6322. PERIOD OF LIEN

Unless another date is specifically fixed by law, the lien imposed by Section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or become unenforceable by reason of lapse of time. (26 U.S.C. §6322)

The Federal government claims $3,804.39 on a theory set forth in *United States v. City of New Britain*, 347 U.S. 81 (1954), that local tax liens compete with Federal tax liens on a first in time, first in right basis, the priority of each lien depending on the time it attached and became choate. Since a Federal lien arises on the date of assessment, following this principle the fund would be substantially used up by four of the claims in the following order:

	Amount	Lien Date
Internal Revenue Service	$1,321.54	2–26–60
Wayne County	197.08	12– 1–60
Internal Revenue Service	2,285.77	2–24–61
Michigan Employment Security Commission	941.23	4–25–61

All parties accept this principle and there is no dispute as to its application.

However, in addition to this theory of priority, the United States is also claiming a priority pursuant to Revised Statute §3466, 31 USC §191.[4] This Section provides that claims of the United States against any person who is insolvent have absolute priority. It is clear from the pleadings that Midwest Steel Fabricators, Inc. was insolvent at the time of the execution of the trust mortgage. This is not now disputed by the County, which is the only defendant actively contesting this motion.

---

[4] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

It has been held by state and lower Federal courts that the priority accorded by Section 3466 is not equivalent to a specific and perfected lien, *e.g. United States v. O'Dell,* 160 F.2d 304 (6th Cir. 1945); *New York v. United States,* 106 F.2d 210 (2d Cir. 1939); *United States v. South Carolina,* 227 S.C. 187, 87 S.E. 2d 577 (1955). Although the Supreme Court, in *United States v. Gilbert Associates,* 345 U.S. 361 (1953), remarked that it has never actually held that there is such an exception, the Federal government does not here contest its existence.

The County of Wayne asserts that it had a prior specific and perfected lien for unpaid *ad valorem* property taxes pursuant to local acts and the General Property Tax law of Michigan.[5] It argues that the liability of the taxpayer to the County arose prior to the assessment by the Federal government and that, although no physical possession of the assets subject to the County's lien were taken, under Section 7.81 Michigan Statutes Annotated, all taxes became a debt owed to and a lien in favor of the County on the tax day provided for in the law. The County relies upon the decision of the Michigan Supreme Court in *In re Ever Krisp Food Products Co.,* 307 Mich. 182, 11 N.W. 2d 852 (1943), which applied the judicial exception to the absolute priority rule and held that a lien is specific and perfected when nothing further need be done to perfect it. This decision was followed by the Court of Appeals for the Sixth Circuit in *United States v. O'Dell, supra.*

However, several years later, in *United States v. Gilbert Associates, supra,* the United States Supreme Court enunciated the test of specificity in the following language, at page 366:

---

[5] Michigan Statutes Annotated §7-1 et seq.

"In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. *Thelusson v. Smith,* 2 Wheat. 396. Until such possession, it remains a general lien. There is no ground for the contention here that the Town had perfected its lien by reducing the property to possession. The record reveals no such action. The mere attachment of the Town's lien before the recording of the federal lien does not, contrary to the holding of the Supreme Court of New Hampshire, give the Town priority over the United States. The taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien. *United States v. Waddill Co., supra; Illinois v. Campbell,* 329 U.S. 362, 370. Where the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, §3466 clearly awards priority to the United States. *United States v. Texas,* 314 U.S. 480, 488."

Since the standard of specificity set forth in *United States v. Gilbert Associates, Inc., supra,* was not applied in *O'Dell* and *Ever-Krisp,* those decisions are not controlling here. *United States v. Leland Door Co.,* Civil Action No. 25208 (E.D. Mich. May 12, 1965).

It is asserted that the recent decision of the Supreme Court in *United States v. Vermont,* 377 U.S. 351 (1964) changes this result and holds that it is not necessary for the County to reduce the property of the taxpayer to its possession in order to have a specific and perfected lien. However, that case dealt with a solvent taxpayer, and the Court expressly differentiated it from the situation involving an insolvent taxpayer, quoting, at page 358, from the *City of New Britain* case:

"When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by §3466 of the Revised Statutes, 31 U.S.C. . . . §191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority [citing *United States v. Gilbert Associates,* 345 U.S. 361; *United States v. Waddill, Holland & Flinn,* 323 U.S. 353]. Where the debtor is not insolvent, Congress has failed to expressly provide for federal priority . . . although the United States is free to pursue the whole of the debtor's property wherever situated." *United States v. New Britain,* 347 U.S. 81, 85."

In this instant case it is not disputed that while the County complied with the statutory requirements for a specific and perfected lien, it did not reduce the property of the insolvent taxpayer to possession. Thus, the lien of the County does not meet the standard of specificity set forth in *United States v. Gilbert Associates, supra.* Although the "first in time, first in right" policy, followed by the Internal Revenue Service for many years, seems to be the more equitable procedure, Section 3466, as interpreted by the United States Supreme Court, dictates otherwise and must be followed.

Therefore, it is ordered the motion of the United States for summary judgment is granted, and that of the County of Wayne is denied.

Fred W. Kaess,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. [redacted]599

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

COUNTY OF WAYNE,
Petitioner-Appellant.

BRIEF OF AMICUS CURIAE, CITY OF DETROIT, AND STATE OF MICHIGAN, IN SUPPORT OF PETITION OF COUNTY OF WAYNE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(For List of Attorneys see Inside Front Cover.)

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

LIST OF ATTORNEYS

STATE OF MICHIGAN:

FRANK J. KELLY,
Attorney General,

ROBERT A. DERENGOSKI,
Solicitor General,

T. CARL HOLBROOK,
WILLIAM D. DEXTER,
Assistant Attorneys General.

CITY OF DETROIT:

ROBERT REESE,
Corporation Counsel,

JULIUS C. PLISKOW,
JOSEPH MAISANO,
Assistants Corporation Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. .....

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

COUNTY OF WAYNE,
Petitioner-Appellant.

BRIEF OF AMICUS CURIAE, CITY OF DETROIT, AND STATE OF MICHIGAN, IN SUPPORT OF PETITION OF COUNTY OF WAYNE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To: The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

City of Detroit and State of Michigan, as *amicus curiae*, support the petition of the County of Wayne for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on June 14, 1967.

A. OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, is unreported as of this date. A copy of the Judgment and Opinion of the Court is not attached hereto, being reported in Appendix B of the County of Wayne filed with this Court. The opinion of Honorable Fred W. Kaess, District Judge for the Eastern District of Michigan, is reported in 247 F. Supp. 84; the same is also attached to petitioner-appellant's petition as Appendix C.

B. JURISDICTION

This case arises from an action instituted by respondent-appellee in the United States District Court seeking to foreclose certain federal tax liens against a fund held by a trustee of the assets of an insolvent debtor executing a trust chattel mortgage for the benefit of creditors. Jurisdiction of such action was invoked by respondent-appellee under Title 28 U.S.C.A., Sections 1340 and 1345, and Title 26 U.S.C.A., Section 7402(a).

Jurisdiction of this Court to issue a writ of certiorari is conferred by Title 28 U.S.C.A., Sections 1254(1) and 2101(c).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where tax debtor is insolvent, should an *ad valorem* personal property tax lien under Michigan law, which lien meets the test of choateness set forth in *U. S. v. New Britain,* 347 U.S. 81 (1954), 98 L. Ed. 520, 74 S. Ct. 367, and *U. S. v. Vermont,* 377 U.S. 351 (1964), 12 L. Ed. 2d 370, 84 S. Ct. 1267, and which said lien is capable of being summarily enforced without any assistance of the courts,

be considered specific, perfected and choate so as to be excepted from the application of Section 3466, Revised Statutes, (31 U.S.C.A. 191) notwithstanding the specificity rule set forth in *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953), 97 L. Ed. 1071, 73 S. Ct. 701?

2. Is the principle of specificity enunciated in *U. S. v. Gilbert Associates, supra,* construing a New Hampshire tax law, applicable without exception to all the sovereign states, including Michigan, without requiring any review of the tax structure of each state to determine whether under its tax laws possession is necessary in order to perfect an *ad valorem* personal property tax lien?

D. QUESTION NOT PRESENTED FOR REVIEW

The existence of a judicial exception to the absolute priority rule of Section 3466, Revised Statutes (31 U.S.C.A. 191), excluding from its purview, specific, perfected and choate liens, has not been contested by the Federal government, and is not presented herein for review.

E. STATUTES INVOLVED

The statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix A attached hereto.

Michigan Statutes Annotated:

Sec. 7.1 (C.L. 1948, Sec. 211.1)
Sec. 7.81 (C.L. 1948, Sec. 211.40)
Sec. 7.83 (C.L. 1948, Sec. 211.42)
Sec. 7.87 (C.L. 1948, Sec. 211.44)
Sec. 7.91 (C.L. 1948, Sec. 211.47)

Section 3466 Revised Statutes:

(31 U.S.C.A. 191)

F. STATEMENT OF THE CASE

The matter here presented involves an appeal of the case brought by respondent-appellee to foreclose certain federal tax liens against the funds held by a trustee under a trust chattel mortgage executed by an insolvent tax debtor for the benefit of creditors. In addition to the trustee and the tax debtor, the following parties were named defendants in the subject action: County of Wayne, Michigan Corporation Securities Commission, Michigan Department of Revenue, and Michigan Employment Security Commission. The latter named agencies of the state did not participate in the arguments before the District Court since the claim of liens possessed by each were patently junior to the liens claimed by the United States and the County of Wayne, and the funds in the hands of the trustee admittedly were not sufficient to pay all lien claims in full. A motion of the City of Detroit to intervene in the action pending before the trial court was denied; however, the court did permit the City to file brief *Amicus Curiae.* The Court of Appeals subsequently permitted the City to file *Amicus Curiae* brief with leave to participate with the County in the oral arguments before that Court. The Court of Appeals also permitted the State of Michigan to file Brief *Amicus Curiae.*

G. REASONS FOR GRANTING WRIT

The issue involved in this case is of great importance not only to the local taxing units of the State of Michigan but also to the taxing units of other states whose claim of liens are supported by statutes which are significantly at variance with the New Hampshire tax laws discussed by the court in *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953),

97 L. Ed. 1071, 73 S. Ct. 701. The granting of this writ is further made necessary by the fact that the Supreme Court of the State of Michigan held in the case of *In re Ever Krisp Food Products Co.*, 307 Mich. 182, 212, 11 N.W. 2d, 852, 862 (1943) that the *ad valorem* personal property tax liens of the City of Detroit and the County of Wayne were specific and choate since "No further process of law or court proceeding was required to determine the amount, or to complete the fixing of the lien, on the respective dates referred to in the City Charter and in the statute law. * * *"

Since both the trial court and the Court of Appeals did not make any attempt in this case to distinguish the Michigan tax statutes from the tax statutes of New Hampshire involved in the Gilbert Associates case, a review by this court is necessary and essential in order to determine if possession is required in the light of the Michigan Supreme Court's holding in the Ever Krisp case that an *ad valorem* lien for personal property taxes in Michigan is specific, perfected and choate, and as such is excepted from the application of Section 3466, R.S.

If specificity requires possession, as the federal government contends, and possession is an impossibility as in *U. S. v. Crest Finance Co.* (1961—7th Cir.) 291 F. 2d 1, is the arbitrary adoption of such principle justified here in view of the state court's pronouncement that the statutory provisions of the Michigan lien law do not require possession to establish choateness of *ad valorem* liens. While that case did not involve insolvency, nevertheless, the impossible situation created there by the strict enforcement of the specificity rule was recognized by the federal government to the extent that it conceded on appeal that the lien of petitioner (Crest) was choate. *Crest Finance Co. v. U. S.*, 368 U.S. 347 (1961) 7 L. Ed. 2d 342, 82 S. Ct. 384.

CONCLUSION

A lien is what the statute makes it. Under Michigan law, an *ad valorem* lien for personal property taxes arises by operation of law and continues until the taxes have been paid in full. *C.L. of 1948,* Sec. 211.40, (Stat. Ann., Sec. 7.81). Excepted from the absolute coverage of the lien are items of personalty sold in the usual course of business. *C.L. of 1948,* Sec. 211.40, (Stat. Ann., Sec. 7.81). When the taxes secured by the lien are not paid within the time provided by statute, the lien is enforceable administratively by levy and distraint without requiring any assistance of the courts. *C.L. of 1948,* Sec. 211.47, (Stat. Ann., Sec. 7.91). The amount of the tax assessment secured by the lien is definite and certain. *C. L. of 1948,* Sec. 211.42, (Stat. Ann., Sec. 7.83); *C.L. of 1948,* Sec. 211.44, (Stat. Ann., Sec. 7.87).

A reading of the foregoing provisions of the Michigan statutes establishes the choateness of the *ad valorem* personal property tax lien of the County of Wayne. The requirement of specificity by possession with respect to local tax lien claims competing with Federal tax claims asserting priority under Sec. 3466, R.S. is unreasonable, unwarranted and not within the Congressional intent manifested at the time the priority statute was enacted. Such specificity requirement would tend to create different standards of choateness; this would bring about a state of confusion and uncertainty among the taxing units of the various states. Adherence of the choate standard laid down in *U. S. v. New Britain, supra,* and *U. S. v. Vermont, supra,* would bring about a more harmonious approach to the vexing problems faced by the various units of government in the collection of tax revenues.

The State of Michigan is also concerned with its ability to utilize collection procedures short of seizure of a taxpayer's property in order to help the taxpayer continue in business and with a change in the working relations between various tax lien claimants in the State of Michigan. To date the various taxing agencies, including the federal government, have recognized as a fair and equitable principle that of "first in time, first in right," as pertains to *bona fide* liens. The state is also concerned with the requirements that personal property be reduced to possession to protect a tax lien that is otherwise perfected under the state law inasmuch as such a rule could give way to the rule of force as the controlling legal principle.

Therefore, *amicus curiae* believe that the writ of certiorari prayed for by the County of Wayne should be granted.

Respectfully submitted,

STATE OF MICHIGAN,

FRANK J. KELLY,
Attorney General,
ROBERT A. DERENGOSKI,
Solicitor General,
T. CARL HOLBROOK,
WILLIAM D. DEXTER,
Assistant Attorneys General,
By: WILLIAM D. DEXTER,
State Capitol,
Lansing, Michigan.

CITY OF DETROIT,

ROBERT REESE,
Corporation Counsel,
JULIUS C. PLISKOW,
JOSEPH MAISANO,
Assistants Corporation Counsel,
By: JULIUS C. PLISKOW,
Detroit, Michigan.

APPENDIX A

MICHIGAN STATUTES ANNOTATED

7.1 MSA (Compiled Laws of Michigan 1948, 211.1)

"PROPERTY SUBJECT TO TAXATION. Section 1.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT, That all property, real and personal within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.

7.81 MSA (Compiled Laws of Michigan 1948, 211.40)

"Notwithstanding any provisions in the charter of any city or village to the contrary, all taxes shall become a debt due to the township, city, village and county from the owner or person otherwise to be assessed on the tax day provided for in sections 2 and 13 of this act, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. Each statement and receipt for taxes on real estate sent or given by any county, township, city or village treasurer shall contain a statement, which shall be printed, stamped or written thereon, setting forth the date of the commencement and ending of the fiscal year of each taxing unit of government during which general taxes stated thereon will defray the costs of governmental services rendered thereby. And

all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, and whether such liens, claims and encumbrances created by chattel mortgage, title retaining contract, execution or upon any other final process of a court, attachment, replevin, judgment or otherwise, become effective prior to the effective date of this act or subsequent thereto, and no transfer of personal property assessed for taxes thereon shall operate to divest or destroy such lien, except where such personal property is actually sold in the regular course of retail trade. The personal property taxes hereafter levied or assessed by any city or village shall be a first lien; prior, superior and paramount to any other claims, liens and encumbrances whatsoever upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

7.83 MSA (Compiled Laws of Michigan 1948, 211.42)

"The supervisor shall thereupon prepare a copy of the said assessment roll, with the taxes assessed as hereinbefore provided, and annex thereto a warrant signed by him, commanding the township or city treas-

urer to collect the several sums mentioned in the last column of such roll and to retain in his hand the amount receivable by law into the township treasury for the purpose therein specified, and to pay over to the county treasurer the amounts which shall have been collected for state and county purposes up to and including the tenth day of January next following, and to the treasurer of each school district the amounts which shall have been collected for such school district up to and including the tenth day of January next following, within 10 days thereafter, and notify the secretary or director of each school district the amount paid to the school district treasurer and the remainder of the amounts therein specified for said purposes, and account in full for all moneys received on or before the first day of March next following; and the said warrant shall authorize and command the treasurer, in case any person named in the assessment roll shall neglect or refuse to pay his tax, to levy the same by distress and sale of the goods and chattels of such person. The supervisor may make a new roll and warrant in case of the loss of the one originally given to the township treasurer; the copy of the roll with the warrant annexed, shall be known as 'the tax roll.'"

7.87 MSA (Compiled Laws of Michigan 1948, 211.44)

"On receiving such tax roll the township treasurer or other collector shall proceed to collect such taxes. The twonship treasurer or other collector shall mail to each taxpayer at his last known address on his tax roll, on the receipt of such tax roll, a statement showing the description of the property against which the tax is levied, the assessed valuation of such property and the amount of the tax thereon. The expense of preparing and mailing such statement shall be paid

from county, township, city or village funds, as the case may be. Failure to send or receive such notice shall not in any way prejudice the right to collect or enforce the payment of any tax. The township treasurer shall remain in his office at some convenient place in his township, village or city on every Friday in the month of December, thereafter, from 9:00 a.m. to 5:00 p.m. to receive taxes, but he shall receive taxes upon any week day when they may be offered. On all sums voluntarity paid before January 20 of the succeeding year, he shall add 1% for collection fees, and upon all taxes paid on or after January 20 he shall add 4%. If the treasurer shall not mail the statements hereinabove required to be mailed on or before December 30, he shall be limited to 1% for collection fees with respect to taxes collected by him on and after January 20. In townships in which the treasurer receives a salary, the township board may waive all or part of the 4% collection fee on taxes paid on or before February 15. All fees collected by the township treasurer in townships where the treasurer receives a salary shall be credited to the contingent fund of the township. When the bond of the treasurer, as provided in section 43, is furnished by a surety company, the cost of the bond shall be paid by the township from the contingent fund of the township. If the township treasurer is apprehensive of the loss of any personal tax assessed upon his roll, he may enforce its collection at any time, and if compelled to seize property or bring suit in December may add 4% for collection fees."

7.91 MSA (Compiled Laws of Michigan 1948, 211.47)

"If any person, firm or corporation shall neglect or refuse to pay any tax assessed to him or them, the township or city treasurer, as the case may be, shall

collect the same by seizing the personal property of such person, firm or corporation, to an amount sufficient to pay such tax, fees and charges for subsequent sale, wherever the same may be found in the state, and from which seizure no property shall be exempt. He may sell the property seized to an amount sufficient to pay the taxes and all charges, in the place where seized, or in the township or city of which he is treasurer, at public auction, on giving public notice of the same at least five (5) days previous to the sale, by posting written or printed notices in three (3) public places in the township, village or city where the sale is to be made, which sale may be adjourned from time to time if he shall deem the same necessary; and in case property shall be seized and advertized as herein directed, during the life of the warrant, the sale may take place at any time within six (6) days after the expiration thereof. If it becomes necessary to sell personal property which brings more than the amount of taxes and charges, the balance shall be returned to the person, firm or corporation from whose possession the property was taken, except as hereinafter provided. If the property so distrained cannot be sold for want of bidders, and in such case only, the treasurer shall return a statement of the fact, and such tax shall be returned as unpaid. The township treasurer, if otherwise unable to collect a tax on personal property, may sue the person, firm or corporation to whom it is assessed, in the name of the township, village or city, and garnishee any debtor or debtors of such person, firm or corporation. The tax roll shall be *prima facie* evidence of the debt sought to be recovered: Provided, That when any person having possession of the personal property of any other person, firm or corporation shall be assessed for such property and shall be

obliged to pay the taxes thereon, such person, firm or corporation so paying the taxes, may recover of the person, firm or corporation for whose benefit the taxes were paid, the money so paid, with the interest thereon in an action of assumpsit: * * * "

Section 3466 Revised Statutes (31 USCA 191).

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 599

COUNTY OF WAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this case is whether Section 3466 of the Revised Statutes, 31 U.S.C. 191, gave the United States priority to assets of an insolvent taxpayer over the general tax lien of petitioner, which had not made its lien specific by taking possession of or title to the taxpayer's property.

The taxpayer, Midwest Steel Fabricators, executed in April 1961 a trust mortgage for the benefit of its creditors. The trustee wound up Midwest's business and liquidated its assets. After satisfying admittedly superior tax claims of the United States, a fund of some $4,800 remained. The United States asserted additional tax claims of $8,150 for which liens had arisen in February 1960, and in February and June 1961.

278-860—67

Petitioner asserted its tax lien, for unpaid *ad valorem* personal property taxes of $197, which had arisen in December 1960.[1]

By amended complaint in an action first commenced to enforce its liens, the United States asserted its priority under Section 3466. Midwest's insolvency was conceded (Pet. 22). Therefore the district court held (Pet. 25), on the United States' motion for summary judgment, that the federal debt was superior under the part of Section 3466 which provides, "[w]henever any person indebted to the United States is insolvent * * * debts due to the United States shall be first satisfied * * *" (Pet. 21–22). The court of appeals affirmed *per curiam* (Pet. 17–18).

The result below is required by the prior decisions of this Court. There is no conflict of decisions or other occasion for further review.

Petitioner's arguments are in substance indistinguishable from those this Court considered and rejected in *United States* v. *Gilbert Associates*, 345 U.S. 361. There a New Hampshire town had a general lien on all the property of an insolvent taxpayer by reason of an assessment of *ad valorem* personal property taxes. The State Supreme Court had held, 97 N.H. 411, 90 A. 2d 499, that the State-created liens were superior to subsequently filed federal tax liens because the State-

[1] Other State taxing authorities, including those filing an *amicus curiae* brief in support of the present petition for certiorari, asserted additional claims totalling nearly $7,700. All of these claims were admittedly junior to the claims of United States and petitioner, and neither the *amici* nor any other junior lien holder claimed a right to recover. See the brief of *amicus curiae* at p. 4.

created interest needed no further judicial action to effect possession, which could have been, but was not, obtained by warrant. This Court, in reversing, first noted that it "has never actually held" that "specific" State-created liens are superior to the priority that Section 3466 gives to debts due the United States to the property of an insolvent taxpayer. This Court then went on to rule that the New Hampshire town in no event had a sufficiently specific lien to overcome the United States' priority under Section 3466 (345 U.S. at 365–366):

> * * * the Town * * * was the holder of a general lien on all the taxpayer's property. * * *
>
> In claims of this type, "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim [to priority under Section 3466] against property no longer in the possession of the debtor. *Thelusson* v. *Smith*, 2 Wheat. 396. Until such possession, it remains a general lien. * * * The taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien. *United States* v. *Waddill Co., supra; Illinois* v. *Campbell*, 329 U.S. 362, 370. Where the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States. *United States* v. *Texas*, 314 U.S. 480, 488.

See also *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Texas*, 314 U.S. 480; *United States* v. *Waddill Co.*,

323 U.S. 353; *Illinois* v. *Campbell*, 329 U.S. 362; *United States* v. *New Britain*, 347 U.S. 81; *United States* v. *Vermont*, 377 U.S. 351; *United States* v. *Equitable Life*, 384 U.S. 323.[2]

Petitioner's lien interest is the same as the New Hampshire town had in *Gilbert Associates*. Thus petitioner argues, as it must (Pet. 8–9), that *Gilbert Associates* should be overruled. As the cases cited above show, however, *Gilbert Associates* was merely an application to the particular facts of a well-settled principle. Petitioner has not shown that this line of authority is wrong; and if any change is warranted in the priorities of Section 3466, as so interpreted, it is a matter for Congress and not this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH KOVNER,
EDWARD LEE ROGERS,
Attorney.

OCTOBER 1967.

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[2] Contrary to the contention of *amicus curiae* (Br. 5; see also Pet. 5, 9), the 1943 decision by the Michigan Supreme Court in *In re Ever Krisp Food Products Co.*, 307 Mich. 182, 11 N. W. 2d 852, that Section 3466 does not give federal tax debts priority over the type of liens involved here, is not a basis for review of the instant case, as it antedates this Court's decision in *Gilbert Associates*.

U.S. GOVERNMENT PRINTING OFFICE: 1967